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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 439

WILOIL CORPORATION,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

Judicial Code § 237, amended by the Act of February 13, 1925, Chapter 229, § 1, 43 Statutes 937, United States Code Annotated, Title 28, § 344 (a), to wit:

> "or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. • • •"

B.

State Supreme Court opinion and judgment (R. 77) reported, 173 Atl. Rep. 404, — Pa. —, in favor of validity.

C.

Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was entered on the 30th day of June, 1934 (R. 77*).

Petition for reargument, in accordance with the rules of the Supreme Court of Pennsylvania, was duly presented to that court, which reargument was refused on the 12th day of July, 1934 (R. 85).

The application for appeal, including assignments of error, was presented on the 4th day of September, 1934 (R. 96).

D.

The question that the tax was an undue burden on interstate commerce was raised in all the courts below. For evidence to that effect see introductory statement of Commonwealth's counsel (R. 9, top of page); introductory statement of appellant's counsel (R. 27); opinion of the Court of Common Pleas of Dauphin County (R. 69); said court's second conclusion of law (R. 71); and opinion of the Supreme Court (R. 77); also stipulation (R. 5).

In addition, the legal question, as required by the rules of the Supreme Court of Pennsylvania, was stated to that court as follows:

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* [NOTE: All references to the record are to the pages of the certified record prepared by the Prothonotary of the Supreme Court of Pennsylvania and on file with the Clerk of this Court. The record has not yet been printed by the Clerk of this Court.]

"Does not the imposition of such a tax upon the appellant under the facts impose an undue burden upon interstate commerce and, therefore, if the Act be so construed as authorizing such a tax is it not in that respect unconstitutional, being in violation of the interstate commerce provision of the Federal Constitution?"

E.

Nature of the Case and Ruling Below.

Commonwealth of Pennsylvania assessed a tax against appellant claiming authority to do so under the provisions of the Liquid Fuels Tax Act of 1931, P. L. 149, Sections 2 and 4, Purdon's Pennsylvania Statutes Annotated Title 72, Sections 2611 (b) and (d) supplement. The taxing authorities of the State assessed a tax against appellant, and appellant appealed therefrom to the Common Pleas Court of Dauphin County, Pennsylvania. In that court the action was styled "Commonwealth of Pennsylvania, plaintiff, *vs.* Wiloil Corporation, defendant." The action was at law in assumpsit. By virtue of Pennsylvania Statute jury trial was waived.

Material portions of said Act are quoted in the Appendix hereto attached. The amending Act, to wit, 1931 P. L. 298, in no way affects questions at issue.

The Facts.

The facts upon which interstate commerce is claimed appear in appellant's (defendant in the courts below) Exhibits 3 and 4 (R. 51 and 52).

Said Exhibit 3 is the contract of sale, the terms of which are nowhere denied.

Appellant, formerly known as Willock Oil Corporation, sold oils and gasolines in car and barge lots, soliciting orders through its several agents.

Agents' orders were required to be confirmed by appellant at its Pittsburgh office. If approved, a confirmation order (said Exhibit 3) constituting the contract was forwarded at once to the purchaser.

The contract called for a particular kind of gasoline to be delivered to purchaser in tank-cars (original packages) at Philadelphia, Pennsylvania, from Wilmington, Delaware, the shipping point; delivery carrier—Reading R. R. The carrier and point of shipment were as contractual as any other part of the obligation.

Shipments to fulfill the contract previously entered into were made August 1, 3, 4, 5, 8, 10, 12 and 14, 1931. (See ink notations bottom and reverse side of said Exhibit 3 [R. 51].)

The tax involves several other contracts, but as the terms and bills of lading were identical it was stipulated at the trial that one contract and one bill of lading were sufficient proof.

Said Exhibit 4 (R. 52), the bill of lading, is a "straight bill", non-negotiable. The seller (appellant), owner of the goods, is named consignor; the purchaser, consignee; delivery carrier, Reading R. R.; point of shipment Wilmington, Delaware, and destination Philadelphia, Pa., purchaser's private siding; thus complying in every respect with the contract.

Appellant in no way acted as broker or agent. (See findings of fact 1 to 6 both inclusive of the Court of Common Pleas of Dauphin County [R. 54]).

It is submitted, based upon the above facts found by both the Courts below—

1. That shipments were made in fulfillment of contracts of sale previously entered into;

2. That they were made as required by the terms of the contract;

3. That the shipments were in interstate commerce, and continued to be so until delivery was finally made to the purchaser in whose hands they came to rest and who was the first one taxable under the uniform decisions of this Court.

The State Courts held:

1. That interstate commerce was not involved;

2. If involved such commerce was only incidental;

3. That the appellant, seller, was not required to perform its contract according to its terms but could have acquired the gasoline from points in Pennsylvania, applying as analogous the State income tax cases and brokers' license cases and other like cases.

F.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction in this case.

The tax was imposed upon the appellant, the seller of the gasoline, which shipped the same from Wilmington, Delaware, directly to the purchaser, consignee, at its private siding, Philadelphia, Pa., pursuant to a contract previously entered into.

(1.)

This Court Has Jurisdiction by Appeal.

(a) The State courts construed and enforced a taxing statute against appellant contrary to and in violation of the Federal commerce clause.

Carpenter v. *Shaw*, 280 U. S. 363, 367, 74 L. Ed. 478-482 (1930).

"Where a Federal right is concerned we are not bound by the characterization given to a state tax by state courts or relieved by it from the duty of considering the real nature of the tax and its effect upon the Federal right asserted."

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 288-289, 66 L. Ed. 239, 242-243 (1921). Opinion by Mr. Justice Van Devanter. The State court in that case, like the State court in the instant case, held that interstate commerce was not involved *and applied and enforced a* State statute which, except for the application in the particular case, was constitutional.

The court in said case held (U. S. Rep., bottom of page 288, L. Ed., page 243):

"In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that, as to the transaction in question, the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied." [Citing cases.]

"The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another." [Citing cases.] • • •

"Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. Like rulings on like grounds will be found in *Eureka Pipe Line Co.* v. *Halla-*

nan. 257 U. S. 265, *ante,* 227, 42 Sup. Ct. Rep. 101, and *United Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277, *ante,* 234, 42 Sup. Ct. Rep. 105."

It is true that the 1916 amendment of Section 237, Judicial Code, was before the Court in that case but is also just as true that the jurisdictional words so construed are the same as they now appear in the 1925 amendment.

Fiske v. *Kansas,* 274 U. S. 380, 385, 71 L. Ed. 1108-1111, decided in 1926, supports the above case in every particular.

This Court in that case stated (U. S. Rep. 385, L. Ed. 1111):

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under §237 of the Judicial Code. • • •
>
> "The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented," [Citing cases.]

Concordia Fire Ins. Co. v. *Illinois,* 54 Sup. Ct. Rep. 30, 78 L. Ed. 1006 (1934)—Opinion by Mr. Justice Van Devanter. Constitutional question; denial of equal protection; Fourteenth Amendment. State authorities assessed foreign corporations at greater values than domestic corporations although the taxing act itself did not call for such discrimination.

(Opinion page 1011):

> "• • • The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it,

and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden 66⅔% greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover F. Ins. Co.* v. *Harding* (*Hanover F. Ins. Co.* v. *Carr*) 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713.

"Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another. Here the application which was made of §30 in respect of the taxation of the net receipts of 1927, *i. e.*, the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications."

(b) Interstate commerce is involved and imposing the tax on the seller, appellant, under the facts in the instant case constitutes a direct and undue burden on interstate commerce.

Shipments from Delaware to Pennsylvania in the instant case were made to fulfill contracts of sale previously entered into.

Sonneborn Bros. v. *Cureton*, 262 U. S. 506-515, 67 L. Ed. 1095-1100 (1922).

Mr. Chief Justice Taft: (U. S. Rep. 515, L. Ed. 1100).

"Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state au-

thorities as exempt from state taxation. They were, in effect, contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence, and any state tax upon it is a regulation of it and burden upon it." [Citing cases.]

Again in said case, commenting upon the case of *Bowman* v. *Continental Oil Company* (U. S. Rep. 519, L. Ed. 1102):

"* * * As to the excise tax, the court directed the injunction to issue with respect to the imposition upon 'sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and condition as when received by plaintiff in that state.' If this covered gasolene that was ordered by the purchaser before importation, it was right. If it covered gasolene, whether in original packages or not, which was sold after it reached its destination, then it was not in accord with the law as we understand it to be under the authorities we have cited."

Askren v. *Continental Oil Company*, 252 U. S. 444-449; 64 L. Ed. 654-659;
Bowman v. *Continental Oil Co.*, 256 U. S. 642-643-649; 65 L. Ed 1139-1143-1145;
Standard Oil Co. v. *Graves*, 249 U. S. 389-394, 63 L. Ed. 662-666;
Gregg Dyeing Co. v. *Query*, 286 U. S. 472-478; 76 L. Ed. 1232-1236-7;
Brown v. *Maryland*, 12 Wheat 419, 6 L. Ed. 678;
Woodruff v. *Parham*, 8 Wall. 123, 19 L. Ed. 382;
Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U. S. 52-63-64, 71 L. Ed. 534-538-539.

Minnesota v. *Blasius*, 290 U. S. 1, 78 L. Ed. 19. Opinion by Mr. Chief Justice Hughes. Decided November 6, 1933.

(L. Ed. 22:)

> "• • • Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. • • •"

(L. Ed. 23:)

> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. [Citing cases.] If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement." [Citing cases.]

The movement in interstate commerce in the case at bar had begun and continued until delivery was made to the purchaser (Exhibits 3 and 4 [R. 51 and 52]). Such delivery was made in tank-car lots (original packages). There was no claim that they were in any way broken up, and the imposing of the tax upon the appellant, seller, is a direct and undue burden upon interstate commerce as shown by a uniform line of authorities of this Court cited above.

The interstate movement was continuous. There was no claim that it was ever in any sense interrupted.

The State Supreme Court attempted to distinguish the instant case and to hold interstate commerce was only incidental because the contract of sale was between citizens of the same State.

Bacon v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615 (1913).

Syllabi 2:

> "The state cannot impose a tax upon articles moving in interstate commerce on the ground that such articles belong to its own citizens. They as well as others are under the protection of the commerce laws of the Constitution."

The above is fully supported by the Opinion of Mr. Justice Hughes, page 511.

(2)

The Error of the State Court is Apparent.

[Although the above, in our opinion, is amply sufficient to show the jurisdiction of this Court on appeal, the following is submitted as a precaution in the nature of an Addenda]:

(a) The tax imposed is a tax on property.

The tax in question in the instant case is not a license or a privilege tax or one based upon the amount of business transacted within the State, but is one imposed upon property after it has come into the State.

Commonwealth v. *Pure Oil Co.*, 303 Pa. 112-116, held that the Act of 1929, P. L. 1037, Section 3, imposed a tax upon property [the tax provision of said Act is the same as the Act of 1931 in question].

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288-294, 65 L. Ed. 638-646.

The Taxing Act of May 21, 1931, P. L. 149, Section 4, Purdon's Pennsylvania Statutes Annotated Title 72, Section 2611 (d) Supplement, imposes the tax as follows:

> "A state tax of three cents a gallon or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth. * * *"

Distributors are required to pay the tax. Section 2 of said Act defines distributors. See Act quoted, appendix hereto.

By the bill of lading, Exhibit 4 (R. 52), the railroad carrier was bound at its peril to deliver the gasoline to the purchaser in tank-car lots (original packages).

The said bill of lading is a "straight bill" non-negotiable.

The Federal Bills of Lading Act of August 29, 1916, Chap. 415, Section 1, 39 Stat. 538, U. S. C. A. Title 49, Section 82, defines a "straight bill of lading" as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill."

By Section 82, U. S. C. A. Title 49 a straight bill of lading is non-negotiable and must be so noted on the bill itself.

Section 122, U. S. C. A. Title 49 defines consignee named in the bill as

> "the person to whom delivery of the goods is to be made."

(b) The courts below held that interstate commerce was not involved or if so it was only incidental.

They based this conclusion of law upon a further conclusion of law that the appellant was not required to make deliveries according to the terms of the contract but could

have, at its election, made deliveries from Pennsylvania or any other point.

Appellant was bound to perform strictly in accordance with the terms of its contract or suffer the possibility of repudiation. It agreed to ship from Wilmington, Delaware, purchaser to pay the freight from that point; delivery carrier—Reading R. R.

Norrington v. *Wright*, 115 U. S. 188 (1885), 29 L. Ed. 366 (Opinion by Mr. Justice Gray, page 203):

> "• • • The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Behn* v. *Burness*, 3B & S. 751; *Bowes* v. *Shand*, 2 App. cas. 455; *Lowber* v. *Bangs*, 2 Wall. 728; *Davison* v. *Lon Lingen*, 113 U. S. 40."

Filley v. *Pope*, 115 U. S. 213 (1885), 219, 29 L. Ed. 372;

Shepard's Citations show that the said cases have been cited with approval many times;

Mitsubishi Goshi Kaisha v. *J. Aron & Co., Inc.* (1926), 16 F. (2d) 185-186.

(c) Assuming, however, for the purpose of argument, that appellant was not bound to perform according to the terms of the contract and at its election could have shipped gasoline from points in Pennsylvania, nevertheless it did ship from Wilmington, Delaware, which was interstate commerce and continued to be until the goods were received by the purchaser on its private siding.

Western Union Telegraph Co. v. *Foster*, 62 L. Ed. 1006 at 1015, 247 U. S. 105 (1917), at page 113. Mr. Justice Holmes:

> "Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. * * * It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued such until it reached 'the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co.* v. *Louisiana R. R. Commission*, 236 U. S. 157, 163."

Eureka Pipe Line Co. v. *Walter S. Hallanan*, 257 U. S. 265-272, 66 L. Ed. 227-232; last paragraph of the opinion;

Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63-64, 71 L. Ed. 534, 538-539.

The Federal Trade Commission case is directly in point and is controlling to the effect that even if the appellant had its election nevertheless the shipment was made in interstate commerce.

Mr. Justice Butler, U. S. Rep. page 64, L. Ed. 539:

> "The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

Therefore we submit the shipment was in interstate commerce and continued until delivery was made to the purchaser after which time the goods came to rest and were then taxable against the purchaser and not the seller, appellant.

(3.)

The Cases Relied on by the State Courts Are Clearly Not Analogous.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290, 66 L. Ed. 622. The tax involved in that case was a privilege tax assessed by the State of Illinois against a West Virginia corporation doing business in the State of Illinois.

Ware & Leland v. *Mobile County*, 209 U. S. 405, 52 L. Ed. 885. The tax involved in that case was a license tax imposed upon brokers engaged in the business of buying and selling futures for speculation or on commission. The taxpayer was a cotton broker. We think it is only necessary to state one fact appearing in the opinion—U. S. Rep. page 413:

> "the stipulated facts show that when the orders transmitted are received in the foreign State the property is bought in that State and there held for the purchaser."

Banker Bros. Co. v. Pennsylvania, 56 L. Ed. 168, 222 U. S. 210 (1911). The tax imposed in this case (mercantile tax) is based upon the amount of sales made in the state by merchants. Banker Bros. were retail vendors of Pierce Arrow automobiles at Pittsburgh, Pa. When they received an order from a Pennsylvania customer, they acquired the car from the Pierce Company at Buffalo, New York. The car was consigned to Banker Bros. and delivered to them at Pittsburgh, Penna.; they unloaded it (no doubt serviced it) and made physical delivery to the purchaser. The tax was based upon the sales made in Pennsylvania.

If the Banker Bros. case can in any way be construed as applying to the instant case (which we say it cannot) then we submit said case is clearly overruled by *Sonneborn Bros.* v. *Cureton, supra*, page 8 of this brief.

United States Glue Co. v. *Oak Creek,* 62 L. Ed. 1135, 247 U. S. 321, is a State income tax case and we believe no further comment is necessary.

Minnesota v. *Blasius,* 290 U. S. 1, 78 L. Ed. 19. The goods in that case were brought into Minnesota and were sold to the party taxed, who held them for future sale. The contention in that case was that the taxpayer contemplated a future sale of goods in interstate commerce and therefore they were not taxable because of the Federal commerce clause. The taxpayer did not at the time have any particular purchaser in contemplation. He made sales at public auction.

Federal Compress & Warehouse Company v. *McLean,* 291 U. S. 17, 78 L. Ed. 343-344. Held that the tax accrued while the goods were in storage and before interstate commerce had begun.

It is therefore respectfully submitted that this case is rightfully before this Court on appeal but if the Court be of a different opinion it is respectfully submitted that it is a case calling for the exercise by this Court of its supervisory powers and that to such end the writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Pennsylvania and finally reverse it.

Respectfully submitted,

A. Leo Weil,
Attorney for Appellant.

J. Smith Christy,
Of Counsel.

APPENDIX.

Material Portions of Liquid Fuels Tax Act of 1931, P. L. 149, Section 2, Purdon's Penna. Statutes Annotated, Title 72, Section 2611 (b) Supplement.

" 'Distributor'.—Any person, as herein defined who or which—

1. Produces, refines, prepares, blends, distils, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.

2. Imports or causes to be imported from any other state or territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.

3. Imports or causes to be imported from any other state or territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.

4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use, or for sale and delivery therein, from any person who has imported the same from a foreign country.

5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other state or territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.

6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid."

Section 4 of Said Act, Purdon's Pennsylvania Statutes Annotated, Title 72, Page 2611 (d) Supplement.

Imposition of Tax:

"A State tax of three cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth."